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Two Views on Dispute Settlement and Trade Laws in the Canada-U.S. Free Trade Agreement

Editor's Note

Much of the debate over the Canada-U.S. Free Trade Agreement has involved the Agreement's legal arrangements for resolving two kinds of trade disputes: those that already arise in response to Canadian-U.S. trade frictions and those that will arise in the future out of the application of the Agreement itself. Opponents of the Agreement say that what Canada obtained offers little or nothing in the way of better institutional mechanisms for resolving disputes. Supporters say that the new arrangements, although less than was hoped for, are a distinct improvement over the status quo.

To assess these issues, the C.D. Howe Institute asked trade law experts from the two countries to assess the Agreement's dispute settlement mechanisms. Debra P. Steger, of the law firm of Fraser & Beatty in Ottawa, is a Canadian trade law expert. Gary N. Horlick and Debra A. Valentine are U.S. experts at the law firm of O'Melveny & Myers in Washington. Mr. Horlick has represented Canada in more than one key case involving the issues he and Ms. Valentine write about here.

Readers must judge the merits of the discussion contained in these two essays. We are impressed, however, with their strong, and informed, opinion that the Agreement's dispute settlement mechanisms are distinct improvements over the status quo. To abandon the Agreement is to abandon a set of institutional mechanisms that would be of significant value to Canadian exporters.

Richard G. Lipsey

A View from the United States

by

Gary N. Horlick and Debra A. Valentine

The Canada-U.S. Free Trade Agreement, signed by President Reagan and Prime Minister Mulroney on January 2, 1988, contains a variety of dispute resolution mechanisms. In this *Trade Monitor*, we review the practical significance of those mechanisms, focusing on the effect they will have on U.S. and Canadian businesses caught up in trade disputes.[1]

The Significance of Dispute Settlement

The Agreement's dispute resolution mechanisms have received an enormous amount of attention, and were the focal point of the dramatic finish of the negotiations last October. They are not, however, the most significant provisions of the Agreement for most U.S. and Canadian businesses. Instead, it is the Agreement's tariff reductions that will have a greater effect across the board on businesses in both countries.

Similarly, a loosening of immigration controls on business visitors will have a great effect in removing obstacles on doing business across the border. By contrast, most businesses in the United States and Canada do not get involved in the kind of trade disputes that will be subject to the Agreement's dispute resolution mechanisms.[2] These mechanisms will, however, have a significant effect on those few businesses that do get involved in trade disputes. That effect can best be seen against the background of the current system.

The Current System

At present, businesses involved in antidumping or countervailing duty cases can challenge decisions of the government agencies involved — the Department of Commerce and the International Trade Commission in the United States, the Department of National Revenue and the Canadian Import Tribunal in Canada — by appealing to the courts of that country. While both countries' courts have provided fair and impartial reviews of such cases, the process is time consuming, easily lasting from two to five years. Meanwhile, the business in question must pay the duties that have been imposed. Even though those duties can be refunded (with interest), working capital is tied up, which can be a significant problem for smaller businesses. Furthermore, many small and medium-sized businesses choose not to challenge the result, because of the cost of such lengthy litigation.[3]

A further disadvantage for U.S. companies caught in Canadian antidumping or countervailing duty cases is the courts' restrictive standard of review. This has made litigants who lose before the administrative agencies unwilling to appeal administrative decisions.

While the current system of judicial review for antidumping and countervailing duty cases in both countries is time consuming and expensive, it is at least binding. By contrast, no such guarantee of binding review exists in current practice for any of the other types of trade disputes that the Agreement covers and, indeed, there is no guarantee of review at all for most of them.

Although exporters currently caught in "escape clause" or "safeguard" cases[4] have a formal right of review in the United States (but not in Canada), the U.S. courts will look only at procedural errors. For their part, countries can appeal safeguards and other trade disputes to the General Agreement on Tariffs and Trade (GATT). The GATT dispute resolution mechanisms, however, have been attacked as being too long, too cumbersome, and too subject to blockage by the affected party.[5]

The New System

The Canada-U.S. Agreement, by contrast, offers two sets of dispute resolution mechanisms, both of which promise faster and more certain consideration of business problems than is currently available. There is a general mechanism, and a special one for antidumping and countervailing duty matters. Both types share certain features. They will function within fixed time periods through five-member panels, with members chosen from pre-established rosters.[6]

The panels will have at least two citizens from each country, with the fifth panelist chosen by the two governments or by the four panelists together, or, as a last resort, by lot from the pre-established rosters. The antidumping and countervailing duty panels will be more "judicial" than the general panels, since a majority of the panelists (including the chairman) will be lawyers.

Antidumping and Countervail

The dispute resolution mechanism for antidumping and countervailing duty cases replaces judicial review of such cases in both countries. This system has a number of advantages, which we discuss below.

Time and Money

For businesses, the primary advantages of this change are savings in time and costs. The highly publicized U.S. countervailing duty case in 1986 against Canadian softwood lumber provides a good illustration of the importance of this change.

In late 1986, the Canadian government negotiated a settlement of that case with the U.S. government, requiring Canadian exporters to pay a 15 percent export tax. The decision to settle the case — rather than to fight what was viewed in Canada as an unfair and legally unjustifiable preliminary Commerce Department determination — was motivated in a large part by the time factor.

Under the current system, neither the Canadian government nor Canadian exporters can contest the softwood lumber decision except by suing in U.S. courts. This would take at least two to four years, during which approximately U.S.$600 million in duties would have to be paid each year. Alternatively, they could challenge the decision in the GATT, but this route often takes even longer for a decision, and even then the United States could block it.

Greater Certainty

A further advantage for exporting companies in both countries is the certainty that an impartial binational tribunal will review any disputed case. The Agreement's provision of such a tribunal is unlikely to discourage the filing of routine, justifiable cases. Rather, the importance of this procedure is for the "wrong" cases — the cases where petitioners think that they can win by applying domestic political pressure to achieve an unfair result.

Such petitioners are likely to be deterred from bringing politically based complaints, since they will know that the administrative agencies will be reluctant to be pressured into politically based decisions when these are subject to review by a binational panel. Moreover, the rigid one-year deadline by which the binational panels must reach a decision reduces the ability of complaining industries to coerce settlements by dragging out the process in the courts.

In late 1987, it was reported that a group of U.S. energy companies had dropped plans for a countervailing duty case against Canadian electricity exports to the United States because the Agreement's provision for binding binational panel review of countervailing duty decisions removed the opportunity from a politically based U.S. decision against the Canadian imports.

Safeguard Actions

In addition to the binding binational panel reviews of antidumping and countervailing duty cases, the Agreement also provides for binding binational panel review of safeguard actions such as the tariffs the United States imposed on shakes and shingles from Canada in 1986, and the quotas Canada imposed on footwear and garments in 1976 and 1977. At present, an exporting company has no serious chance for review of such decisions.

In 1980, one Canadian food processor appealed a U.S. safeguard decision to impose tariffs on South Korean and Taiwanese mushrooms that, in a classical example of the "sideswipe" effect, also hit frozen breaded mushrooms from Canada. After a lengthy appeal process in the U.S. courts, all the Canadian company got was a court opinion that the U.S. safeguard decision could be challenged only if it were procedurally invalid.

The only current deterrent to safeguard action is the threat that the other country will retaliate by imposing duties, as Canada did on U.S. exports in the shakes and shingles case. But this is small comfort to the exporting companies, since they frequently get no benefit from the retaliation.[7]

The Agreement contains several provisions that will change significantly the way safeguard cases such as these are handled between the two countries.

Exclusion Where Imports Are Small

First, safeguard actions will no longer apply to imports from one country that amount to less than 5 to 10 percent of the other country's total imports. This is important to the many Canadian exporters who are frequently included in U.S. safeguard cases when the real target is sales from other countries. Had this provision been in effect since 1980, Canadian exporters caught up in U.S. cases involving mushrooms, some foundry products, copper, apple juice, sugar, tuna fish, and television sets would not have had to go through the expense of mounting a full defense, since, in each of these cases, Canada was the source of less than 5 percent of total U.S. imports.

The Requirement for Significant Harm

Even if imports from one country are more than 5 to 10 percent of the total imports of the other, they will not be subject to safeguard measures if they do not "contribute significantly" *on their own* to the problem in the importing country. An example of how this will work can be seen in the 1980 automobile safeguard case in the United States. In this case, while the U.S. International Trade Commission decided, by a 3 to 2 vote, that total imports from all countries were not the cause of injury to the U.S. auto industry, the vote was an extremely close one and could have easily have gone the other way.

Had the vote indeed gone the other way, and had the Agreement been in effect, a strong argument could have been made to exclude imports of Canadian autos from any safeguard action. They were not by themselves contributing to the U.S. industry's injury, since the case really had been aimed at imports of small cars from Japan, rather than at imports of large cars from Canada by the "Big Three" North American auto producers. For Canada, the advantage of this provision is that Canadian producers would escape the quotas or higher duties that the United States might impose on imports from other countries.

More Certainty

The general dispute resolution mechanism, although not necessarily as binding as the antidumping, countervailing duty, and safeguard provisions, still offers certain significant advantages to businesses in both countries. This is because of its adavantages over the current system of bilateral consultations between the two governments, or appeal to the slower, less certain GATT dispute resolution mechanisms.

At present, for example, Canada can go to the GATT if it objects to the way the United States administers its customs user fees. In fact, Canada did so in late 1986, and the GATT panel voted in its favor in October 1987. But so far, the U.S. administration has not bothered even to submit to Congress legislation conforming to the GATT panel decision. Under the Agreement, by contrast, the two parties will be able to agree formally to binding arbitration in such disputes. Even if they do not do so, there is a formal commitment to have a panel report in four-and-a-half months, as opposed to the slower GATT process and, unlike the GATT, the other side can retaliate without having to go through any further procedures. In addition, unlike the GATT, neither side can block the panel report, nor can a third country.

What the Agreement Fails To Do

It is worth mentioning certain things that the Agreement does *not* do.

First, the two countries have not agreed to replace their current system of antidumping and countervailing duty laws with a jointly administered system or with common rules. Quite simply, neither side could agree to give up its right to subsidize, even though subsidies in both countries — with the possible exception of agriculture — tend to be quite small, although useful for ribbon-cutting purposes by members of Parliament or Congress.

The two countries have agreed to try, over the next five to seven years, to negotiate a new system. Even if they are unable fully to solve the politically charged subsidy questions, they should be able to agree on changes that will weed out trivial antidumping and countervailing duty cases and *completely replace* the dumping laws with a system of fair price competition.

Second, the Agreement does not provide a clear opportunity for businesses to resolve trade disputes expeditiously and inexpensively without having to go through the full formal administrative and appeal procedures. (This was recommended, for example, by joint committees of the U.S. and Canadian Chambers of Commerce, by the Canadian Manufacturers' Association, and by the U.S. National Association of Manufacturers.) Such an informal process would have paralleled the use of various forms of alternative dispute resolution in domestic litigation.

Obviously, such a system should not preclude businesses for which a more summary procedure is not satisfactory from exercising their full set of rights, nor should it be used as a "cover" for industry agreements with anticompetitive effects. It would, however, be welcome to many businesses that prefer to "get on with business" rather than to spend a year or two — or more — with a matter in dispute.

Conclusion

The dispute resolution mechanism of the Canada-U.S. Free Trade Agreement offers significant advantages to businesses on both sides of the border:

- it assures binational review of trade disputes within shorter time periods than are available at present for judicial review of antidumping and countervailing duty determinations;
- it offers a binding review of safeguard decisions not currently reviewable; and
- it offers a process of government dispute resolution that should be faster, and less subject to political blockage, than are current GATT procedures for other disputes.

The Agreement is not perfect. There are considerable opportunities for improvement in the substantive trade law rules. Businesses on both sides of the border should pursue these opportunities vigorously through the working group the Agreement sets up. They should also seek possible alternative forms of dispute resolution that could precede formal administrative proceedings in both countries. What the Agreement does offer, however, is significantly better than what we now have.

Notes

1. We have outlined the Agreement's dispute resolution mechanisms in greater detail in G. Horlick and D. Valentine, *Improvements in Trade Remedy Law and Procedures under the Canada-U.S. Free Trade Agreement* (Ottawa: University of Ottawa Law School, forthcoming).

2. These mechanisms deal with trade disputes between the two countries, such as antidumping or countervailing duty cases, or other attempts at government intervention in trade. Normal contractual disputes between companies, for example, will continue to be dealt with through the normal routes of court litigation, or arbitration, or other forms of domestic dispute settlement.

3. Since governments almost invariably avoid appearing in the courts of another country, the exporting company's national government is unlikely to bear the burden even in those cases where it would be permitted to appear.

4. Section 201 of the U.S. *Trade Act of 1974*, Section 8 of the Customs Tariff and Section 5 of the *Export and Import Permits Act* and other measures in Canada.

5. See R. Hudec, "GATT Dispute Settlement after the Tokyo Round: An Unfinished Business," *Cornell International Law Journal* 13 (1980): 145. Even though the GATT dispute resolution process has improved recently, it still falls far short of that contained in the Canada-U.S. Agreement.

6. Having the roster set in advance and panels set up promptly represents a considerable improvement over current GATT practice, where considerable delays occur in reaching agreement to establish a panel and agreement on the identity of the specific panelists.

7. In the shakes and shingles case, there were no significant imports from the United States into Canada of cedar shakes and shingles. Canada retaliated against U.S. computer parts, which helped Canadian computer parts manufacturers but did no good for Canadian shake and shingle producers who were paying the extra tariff in the United States.

A View from Canada

by

Debra P. Steger

Rules are important in international trade because they bring a measure of predictability and stability to international relations. For a small country such as Canada, engaged in a major trading relationship with a much larger world power, there are significant benefits to basing that relationship on a system of rules. The Canada-U.S. Free Trade Agreement establishes a unique and comprehensive set of rules to govern the trading relationship between the two countries. It also sets up an institutional framework to monitor that relationship and to avoid, or resolve, disputes.

Improved Dispute Mechanisms

The current system for resolving trade disputes consists primarily of the General Agreement on Tariffs and Trade (GATT) and domestic Canadian and U.S. trade laws. The Agreement's dispute settlement mechanisms are an improvement over this system in several respects:

- The Agreement mandates substantial changes to the "escape clause" or "safeguard" laws of both countries, changes that are likely to reduce the number of bilateral disputes involving the imposition of emergency border measures, such as temporary surcharges or quantitative restrictions. Either country may refer a complaint about the imposition of an emergency measure to a binding arbitration panel.
- The new binational panel system for antidumping and countervailing duty cases should reduce the delays and costs involved for private firms in appealing the decisions of international trade agencies through the courts in the United States and Canada.
- The two countries' commitment to work together to develop and implement a new system of trade laws is an important step for the bilateral trading relationship as well as the Uruguay Round of GATT multilateral trade negotiations.
- The establishment of formal, new channels of communication between the two governments prior to the enactment of new trade legislation should provide an early warning mechanism for potential problems, and encourage them to avoid or seek an early resolution of disputes.
- The establishment of a Canada-U.S. Trade Commission with the ability to appoint binding arbitration panels, or panels of experts, to arbitrate or resolve particular disputes, is an important new step in Canadian-U.S.trade relations.

Although the Agreement's institutional mechanisms are not perfect, they could evolve into a more permanent, authoritative binational institution in the future. Designing a set of institutions to administer a new trade agreement and to resolve disputes that may arise requires delicately balancing the purpose and objectives of the agreement with the concerns of the member governments about ceding decisionmaking authority to a new supranational body.

The Canada-U.S. Agreement, by its nature, is an evolutionary document. Some of its rules — on antidumping and countervailing duty laws, intellectual property laws, trade in services, financial services, government procurement, and agriculture, for example — will be subject to future negotiations and development. Economic and institutional exigencies will require that the rules and institutions be modified over time to meet changing conditions in both countries.

The Agreement

Antidumping and Countervailing Duty Provisions

Canadian and U.S. laws concerning antidumping and countervailing duties are similar. Both countries have actively applied these laws against imports from one another. During the period from 1980 to 1986, Canada investigated 31 antidumping cases and 1 countervailing duty case involving imports from the United States. At the same time, the United States investigated 17 antidumping and 13 countervailing duty cases involving imports from Canada.

The Agreement commits the two countries to establish a binational Working Group to develop a new system of trade laws applicable in both countries within five to seven years. Such a proposal is not new. The Royal Commission on the Economic Union and Development Prospects for Canada (the Macdonald Commission) recommended in 1985 that a Committee of Ministers be established to make major decisions concerning the interpretation and implementation of a free trade agreement. It recommended that the Committee establish a panel to adjudicate disputes involving the enforcement of antidumping, countervailing duty, and safeguard laws.

Interim Procedures

The Agreement's interim procedures to deal with antidumping and countervailing duty disputes until the new system of trade laws is implemented are an improvement over the current domestic systems. Canadian industries have experienced difficulties with the U.S. trade remedy system in a few key cases, such as softwood lumber, where political considerations appear to have influenced the determinations of investigating agencies. The U.S. Congress has also been willing to amend U.S. laws in response to intensive lobbying efforts by unsuccessful U.S. complainants.

The new provisions should ensure that the administration of antidumping and countervailing duty laws is more predictable and stable and, thus, should reduce the uncertainties many Canadian firms experience.

The provisions will affect, first of all, how the United States amends its trade laws. At present, there is no formal mechanism requiring the two governments to communicate with each other prior to the enactment of new trade legislation. Before the United States amends its trade laws in future, it will be required to provide the Canadian government with written notice and an opportunity for consultation. Also, by specifically requiring Congress to name Canada in any future changes to U.S. trade laws, the Agreement should inhibit it from making any future changes in antidumping and countervailing duty laws that are protectionist in their application to Canada.

If government-to-government consultations fail to achieve a mutually acceptable resolution, Canada may request that a binational panel be formed to consider whether proposed U.S. legislation is consistent with the GATT, the Antidumping Code, and the Subsidies Code, as well as with the Agreement. The ability of an international body to review proposed legislation and to determine whether it is in accordance with international obligations prior to its enactment is a unique achievement in international relations.

Advantages of the Binational Panel

The binational panel procedure for reviewing final antidumping and countervailing duty orders promises to be faster, cheaper, and simpler than the current system.

It will be faster, since binational panels will take the place of the courts in many cases, and if either country requests, in reviewing certain decisions of Canada's Department of National Revenue and Canadian Import Tribunal, and the U.S. Department of Commerce and International Trade Commission. This procedure should provide an important commercial benefit to Canadian exporters, by ensuring that a final agency determination is reviewed more expeditiously than is now the case with the court system.

It will be cheaper, since Canadian exporters involved in a countervailing duty or antidumping investigation in the United States now must bear the full costs of presenting their case before administrative agencies and the courts. Under the Agreement, however, requests for case reviews can come only from one of the member governments, so the cost to private firms engaged in a countervailing duty or antidumping action will,

in most cases, be reduced. (If a company requests it to do so within specified time limits, its national government must initiate a review by a binational panel. The company may choose to appear independently before a panel, with its own counsel.)

It will be simpler, since, under the current system, the possibility of legislative amendments by Congress has meant that Canadian firms often have had to plead their cases before Congress and U.S. government agencies such as the U.S. Trade Representative. In future, the new consultative procedure for legislative amendments will reduce the likelihood of congressional amendments to deal with particular cases.

The decisions of binational panels in antidumping or countervailing duty cases will be binding on the Canadian and U.S. governments and their agencies. This should have a sobering effect on the investigating agencies.

There is a perception in Canada that the decisions of the Canadian Import Tribunal or the Department of National Revenue are unlikely to be overturned by the courts, and the record since 1983 certainly bears this out. Although the instances in which either the U.S. Department of Commerce or the International Trade Commission was influenced by political considerations have been rare — the apparent exception being the 1986 Department of Commerce decision in the softwood lumber case — the fact that, in future, their decisions will be reviewed by binational, independent panels should help to encourage carefully considered, objective decisionmaking by these agencies.

Proposals for a New Trade Law System

Several experts have recommended that the antidumping laws be abolished and replaced with domestic competition laws. The establishment of a free trade area, they argue, will eliminate the incentives for exporters to dump. If tariffs are reduced to zero, there would no longer be separate, divisible markets, and competitors in the importing country could simply ship dumped imports back to the exporting country. They recommend that, in an integrated North American market without tariff barriers, the regulation of discriminatory pricing practices should be left to the domestic competition laws. In both countries, there are price discrimination and predatory pricing laws to prevent anticompetitive pricing practices from causing competitive distortions in the marketplace.

A number of proposals have been made concerning subsidies and the application of countermeasures (or countervailing duties) to discipline them. These have ranged from developing a "subsidies code" to be administered by the existing domestic agencies, to establishing a new binational system for regulating the use of subsidies similar to that in effect in the European Community (EC).

Political rhetoric notwithstanding, no trade expert has seriously recommended that Canadian industries be exempted from U.S. countervailing duty laws. It has long been recognized within the GATT that certain types of subsidies have effects that are trade distorting. For this reason, the GATT provides member countries with the right to apply countervailing duties against subsidized imports. Difficulty has arisen over interpretation of both the GATT and the Subsidies Code, which was signed in 1979 as a result of the Tokyo Round of multilateral trade negotiations, because both agreements are ambiguous on the definition of "countervailable" subsidies. As a result, the definition and administration of the rules has been left largely to domestic governments.

Emergency Actions

The Agreement's new provisions on "emergency actions" are an improvement over the current safeguard measures the two countries apply under Article XIX of the GATT. There is to be a two-track system for future border measures, such as additional duties or quotas, to deal with serious injury caused to a domestic industry by sudden surges in imports. A special bilateral track will deal with increases in imports caused by the reduction of duties under the Agreement. The imposition of such relief measures under the bilateral track is limited to a period of three years, they may be taken only during the transition period — that is, until 1998 — and they may be taken only once for a particular product.

The Agreement also contains substantial changes affecting global safeguard actions. In future cases involving imports from several countries, the United States will exclude

Canadian imports unless they are substantial and contribute importantly to the serious injury caused or threatened by all imports. For imports from Canada to be considered substantial, they must represent more than 5 to 10 percent of total imports. These new standards will reduce the number of U.S. safeguard cases involving imports from several countries in which Canada has been "sideswiped".

Finally, the Agreement provides formal procedures for notification and consultation before either country can take measures under the bilateral or global tracks. Either country may challenge a safeguard imposed by the other by directing that an arbitration panel be established to settle the dispute. That panel's decision will be final and binding on both countries.

Institutional Provisions

The Agreement's institutional provisions herald a new era in Canadian-U.S. trade relations. Currently, Canada and the United States do not have a formalized system for notifying and consulting with each other about domestic laws and policies that may affect bilateral trade. Apart from the GATT, there are no formal mechanisms for resolving trade disputes between the two countries. Although the GATT dispute settlement mechanisms are being improved, they are not always effective because of governments' delay and hesitation to use them.

The Agreement's provisions improve on the current system by establishing:

- mandatory notification and consultation procedures for existing or proposed government actions in a much broader range of areas than the GATT currently provides for;
- strict time limits at every stage of the dispute settlement process;
- mandatory, speedy initiation of cases before binational panels; and
- binding decisions in some cases.

The GATT dispute settlement process is often subject to delays, particularly in the initiation of investigations and the adoption of legal rulings. The Agreement improves on these problems by providing for mandatory initiation upon request by either country. The Agreement's procedures are also an improvement on the GATT mechanisms in that binational panels, in certain cases, may make binding legal decisions, which the GATT panels cannot. With respect to any emergency or safeguard action, for instance, an arbitration panel's decision will have binding legal effect on both countries' governments and their agencies. In other cases, the Canada-U.S. Trade Commission may decide to refer a matter to an arbitration panel on the basis that its decision will be legally binding.

In cases where the Commission decides not to invoke the binding arbitration procedure, it will reach a decision by consensus, after receiving the report of a panel of experts. In such cases, the Commission must achieve its decision within explicit time limits or the injured country may take retaliatory action. Compared with the status quo, the opportunities for the larger country to wield its political influence, and thus to delay and defeat the process, will be lessened where there is a more formal, legal process for arbitration and dispute adjudication supervised by a binational Commission.

Comparison with Other Free Trade Area Agreements

Antidumping and Countervailing Duty Provisions

None of the world's free trade area agreements have exempted members from each other's antidumping or countervailing duty laws. In fact, most agreements explicitly acknowledge the rights of member countries to apply such laws as permitted under the GATT. Some examples of how other free trade area agreements deal with this issue include:

The U.S.-Israel Agreement. In the U.S.-Israel Free Trade Area Agreement of 1985, both countries explicitly retain their ability to impose duties or equivalent measures as permitted under the GATT. As a result of that agreement, Israel agreed to become a signatory to the Antidumping Code and the Subsidies Code, and to eliminate certain export subsidies. The U.S.-Israel Agreement states explicitly that its general

dispute settlement provisions do not apply to antidumping or countervailing duty cases.

The EFTA and EFTA-EC Agreements. The Convention Establishing the European Free Trade Association (EFTA), signed in Stockholm in 1960, provides that nothing in it shall prevent any member state from taking action against dumped or subsidized imports consistent with the GATT. The bilateral agreements between EFTA countries and the EC, such as the EC-Sweden Agreement, provide that either party, if it finds that dumping is taking place in trade with the other party, may take appropriate measures in accordance with the GATT. There are no provisions in these agreements explicitly relating to countervailing duties. Both the EC and Sweden are prohibited under their bilateral agreement from granting subsidies that distort, or threaten to distort, competition. Either country may refer a subsidy practice to the Joint Committee established under that agreement, which may examine the matter and, if appropriate, order the practice eliminated.

The Australia-New Zealand CERTA. In the Australia-New Zealand Closer Economic Relations Trade Agreement (CERTA), signed in 1983, the two countries are authorized to impose antidumping duties in cases where the GATT requirements have been satisfied. There are, however, specific provisions requiring the investigating country to give prompt, written notice to the exporting country, and to afford it the opportunity to request consultations when an investigation has been commenced. Either country may levy countervailing duties on goods imported from the other country where a decision has been made in accordance with the GATT, the Subsidies Code, and the CERTA, and where no mutually acceptable alternative appears to be available. There are special provisions in the CERTA providing for notification, consultation, and expeditious resolution of countervailing duty disputes.

Emergency Actions

Most other free trade area agreements in effect among industrialized countries include specific bilateral provisions on emergency actions or safeguards. The U.S.-Israel Agreement, for example, contains a provision requiring government-to-government consultations before either country can take any measure affecting the trade of the other. This agreement, however, does not provide protection from sideswipe in global emergency action cases as does the Canada-U.S. Agreement.

The Australia-New Zealand CERTA envisages that the two countries will use safeguard measures against one another only if no other solution can be found and only during the transition period. It provides for mandatory notification and consultations before either country can impose safeguards. If they are unable to achieve a consensus, the complainant country may refer the matter to an industry advisory body for investigation, report, and recommendation for appropriate action consistent with the CERTA. After 1988, the importing country may request consultations if one its industries experiences, or is threatened with, injury as a result of increased imports from the other country, but remedial action may be taken only if both countries agree.

Institutional Provisions

The institutional provisions of the Canada-U.S. Agreement are an improvement on those of other free trade area agreement and, indeed, the GATT. To establish this point, we must first review the provisions of other agreements.

The U.S.-Israel Agreement. The general dispute settlement provisions of the U.S.-Israel Agreement may be invoked only if one country considers that: (i) the other has failed to carry out its obligations under the agreement, or (ii) that measures taken by the other country either severely distort the trade benefits the agreement accords or substantially undermine its objectives. When a dispute arises, the two countries are obliged to attempt, first of all, to achieve a mutually agreeable resolution through government-to-government consultations. If they fail to resolve the dispute in this way, either country may refer the matter to a Joint Committee, which is made up of ministerial representatives from both countries. If the dispute is still unresolved after this step, either country then may refer the matter to a conciliation panel. If the panel is unable to help the two countries reach a mutually agreeable resolution of the dispute within three

months, it must present a nonbinding report containing findings of fact, its determination as to whether either party has failed to carry out its obligations under the agreement, and a proposal on how to resolve the dispute. After the panel has presented its report, the injured country is entitled to take any measure it feels is appropriate.

The Australia-New Zealand CERTA. No permanent ministerial committee or commission is established under the Australia-New Zealand CERTA. Instead, ministers meet annually to review the general operation of the agreement. The agreement also contains no formal mechanisms to resolve disputes jointly. Opportunities for consultations are built into the substantive provisions of the CERTA, but there are no explicit conciliation, mediation, arbitration, or adjudication procedures.

EFTA. The EFTA Convention provides for the establishment of a Council comprised of one representative from each member country. The Council may decide to set up any committees or advisory bodies necessary to carry out its responsibilities. If a member country considers that any EFTA benefit or objective is being frustrated, and that consultations have not resulted in a satisfactory resolution, it may refer the matter to the Council. The Council then may make arrangements for examining the matter, including appointing an examining committee, making a recommendation to the countries involved, and, if necessary, authorizing retaliatory action. In exercising its responsibilities, the Council may decide to make binding decisions or merely to make recommendations to the member countries. Decisions and recommendations of the Council are made by consensus.

Comparison with the Canada-U.S. Agreement. The general dispute settlement provisions of the Canada-U.S. Agreement are an improvement on those of other free trade area agreements and the GATT in the following respects:

- A permanent Commission will be established to supervise the operation of the Agreement, to oversee its further elaboration, and to resolve disputes.
- The Commission will be authorized to appoint binational panels to make binding decisions, as it directs.

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- Explicit time limits are set out for every stage of the dispute resolution process, which should encourage disputes to be dealt with expeditiously.
- The Agreement provides for a mandatory speedy start and finish of the dispute settlement process.

Neither the U.S.-Israel Agreement nor the Australia-New Zealand CERTA provides for the establishment of a permanent Commission with wide powers to supervise the operation and further elaboration of the agreement or the ability to establish panels to make binding decisions. Rather, they provide only for *ad hoc* consultations or conciliation, and the ultimate decisionmaking power rests with the sovereign member states. The EFTA process, although somewhat more formal, is often subject to delays because decisions, including initiation of an investigation of a particular matter, are subject to a consensus vote by the Council. Also, the EFTA dispute resolution process contains no specific time limits.

The GATT dispute settlement process has been criticized in the past for being subject to delays and influence by the more powerful countries. Although it has been improved considerably in the 1980s, it can still be subject to delays. GATT panels also do not have the authority to make binding decisions. Proposals are being considered in the Uruguay Round to improve the GATT system by the establishment of mandatory initiation and the adoption of panel

report procedures, and by giving panels the authority to make legally binding decisions. For the time being, however, the general mechanisms contained in the Canada-U.S. Agreement are a model for the world trading community.

Conclusion

The Canada-U.S. Free Trade Agreement's dispute settlement mechanisms represent an important break with the increasing pattern of unilateralism that has characterized bilateral trade relations in the past few years. Canada and the United States have agreed to develop a common system of trade laws within the next five to seven years. In the interim, an important new set of checks and balances will be established to ensure that the two countries' domestic trade laws are not changed in ways that would hamper access to each other's market. Also, new binational review procedures will be established to provide Canadian exporters involved in U.S. antidumping or countervailing duty cases with more timely and less expensive review of final agency orders. The existence of the binational review process should also encourage objective and fair decisions by the U.S. Department of Commerce and International Trade Commission and limit the ability of Congress to create new protectionist trade laws affecting Canada.

Important new substantive provisions in the Agreement concerning emergency actions should limit the application of safeguard measures in global cases where imports from Canada are not a major cause of a U.S. industry's problems. Explicit procedures requiring notification and consultation before an additional duty or quota is imposed, and providing the affected country with the right to complain to a binding arbitration panel about the imposition of a safeguard measure, should help to create greater certainty and reduce the threat of safeguard laws being used for protectionist purposes.

The establishment of a binational Canada-U.S. Trade Commission to supervise the operation of the Agreement, to assist in its further elaboration, and to resolve disputes should herald a new era of bilateral decisionmaking in Canadian-U.S. trade relations.

New formalized channels of communication between the two governments, prior to taking new legislative or other actions that may affect trade, are to be established where there were none before. The explicit, relatively short time limits that are set out for every stage of consultation, conciliation, arbitration, and dispute resolution should encourage expeditious, effective settlement of disputes at least cost to private industries. The ability of binational panels to make binding decisions in antidumping, countervailing duty, and emergency action cases, as well as any other case the Commission selects, should help to provide greater certainty and security of access to the U.S. market for Canadian exporters.